

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

SEPRACOR INC.,

Plaintiff,

v.

DEY, L.P. and DEY, INC.,

Defendants.

C.A. No. 06-113-KAJ

SEPRACOR INC.,

Plaintiff,

v.

DEY, L.P. and DEY, INC.,

Defendants.

C.A. No. 06-604-KAJ

**PLAINTIFF SEPRACOR INC.'S MOTION FOR LEAVE
TO FILE SUR-REPLY ON
DEFENDANTS DEY, L.P.'S AND DEY, INC. 'S
MOTION TO CONSOLIDATE**

Sepracor Inc. ("Sepracor") hereby moves, in accordance with Local Rule 7.1.2.(c), for leave to file a Sur-Reply in opposition to the motion to consolidate filed by Defendants Dey, L.P. and Dey, Inc. (collectively "Dey"). As grounds for this motion, Sepracor states that (1) Dey's Reply mischaracterizes facts and is thus misleading; and (2) Sepracor's proposed Sur-Reply will be of substantial assistance to the Court.

In its Reply, Dey attempts to imply that Sepracor is at fault for what it characterizes as an "extended scheduling order in . . . the []Breath action" and thus argues Sepracor is improperly

"maintain[ing] its monopoly on the sale of levalbuterol." DEY'S REPLY IN SUPPORT OF ITS MOTION TO CONSOLIDATE ("DEY'S REPLY") at 2 n.1. Dey's discussion about the Breath action is misleading because Dey fails to inform this Court that Breath sought to have a schedule that was longer than the one proposed by Sepracor. Sepracor wishes to bring to the Court's attention, through a short Sur-Reply Brief and exhibits, the actual facts from the Breath litigation. Additionally, despite the undisputed fact that Dey waited to file its second ANDA and thus caused there to be a delay of over seven months between the time period Sepracor could file suit in the Dey I and Dey II cases, Dey's accusations of delay on the part of Sepracor are disingenuous and misleading.

If leave is granted, Sepracor can file a short (not longer than three or four pages) Sur-Reply with several short exhibits not later than one business day following any order granting such leave.

For the foregoing reasons, Sepracor respectfully requests the Court to grant Sepracor's motion for leave.

THE BAYARD FIRM

November 22, 2006

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STATEMENT PURSUANT TO L.R. 7.1.1.

In accordance with Rule 7.1.1 of the Local Rules of the United States District Court for the District of Delaware, I hereby certify that counsel for Plaintiff Sepracor Inc. has made a reasonable efforts within the applicable time constraints to reach agreement with counsel for Dey, Inc. and Dey, L.P. on the matters set forth in Dey's Motion for Leave, and the parties have not been able to reach agreement. Specifically, I sent an email request to my counterparts on November 21, 2006, and I have not heard from them since.

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that, on November 22, 2006, he electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will send automatic notification of the filing to the following:

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The undersigned counsel further certifies that, on November 22, 2006, copies of the foregoing document were sent by email and hand to the above local counsel and by email and first class mail to the following non-registered participant:

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